Supreme Court, U. S.
FILED
SEP 11 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 73-1245

UNITED STATES OF AMERICA, *Petitioner*

v.

RICHARD V. BISCEGLIA, as Vice President of the Commercial Bank of Middlesboro, Kentucky, *Respondent*

On Writ of Certiorari from the Judgment of the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

JOHN FLETCHER ROLPH, III
Tax Counsel

HENRY C. RUEMPLER
Assistant Tax Counsel

AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Amicus Curiae

FRANK R. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
ISSUE PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
INTEREST OF AMICUS CURIAE	4
SUMMARY OF THE ARGUMENT	6
ARGUMENT	8
I. The "No Name" Summons Issued By The Internal Revenue Service Requiring The Bank To Produce Records Is Invalid And Beyond The Authority Granted To The Internal Revenue Service Under Section 7602 Of The Internal Revenue Code of 1954	8
A. The summons is invalid because it fails to specify a particular taxpayer whose tax liability is under investigation	8
B. The summons is invalid because it does not satisfy any of the four conditions contained in the statute as proper grounds for the issuance of such summons	12
C. The summons issued to the bank cannot be justified under the authority of Section 7601 of the Code	17
D. Requiring the IRS to either identify the taxpayer or to specify that a tax liability does exist will not unduly hamper the IRS in the performance of its duties	19
II. The "No Name" Summons Issued By The Internal Revenue Service Requiring The Bank To	

Page

Produce Records Is Invalid And Constitutes An Unreasonable Search In Violation Of The Fourth Amendment 21

CONCLUSION 25

APPENDIX 26

TABLE OF CITATIONS

CASES:

Hubner v. *Tucker*, 245 F.2d 35 (9th Cir., 1957) 22, 23
McDonough v. *Lambert*, 94 F.2d 838 (1st Cir., 1938) 9, 15, 16
Mays v. *Davis*, 7 F. Supp. 596 (W.D. Pa., 1934) .9, 11, 15, 16
Oklahoma Press Publishing Company v. *Walling*, 327 U.S. 186, 208 (1946) 21, 23, 24
Peterson v. *Idaho First National Bank*, 84 Ida. 10, 367 P.2d 284 (1961) 5
Reisman v. *Caplin*, 375 U.S. 440 (1964) 20
Tillotson v. *Boughner*, 333 F.2d 515 (7th Cir., 1964) *cert. denied* 379 U.S. 913 (1964) 11, 15, 19
Tillotson v. *Boughner*, 225 F. Supp. 45, (N.D. Ill., 1963) 16
United States v. *Armour*, 74-1 U.S.T.C., Par. 9479 (D. Conn., 4/25/74) 19
United States v. *Dauphin Deposit Trust Company*, 385 F.2d 129 (3rd Cir., 1967) 22
United States v. *First National Bank of Mobile*, 295 F.142 (S.D. Ala., 1924) *aff'd without opinion* 267 U.S. 576 (1925) 22
United States v. *Harrington*, 388 F.2d 520 (2nd Cir., 1968) 23
United States v. *Humble Oil & Refining Company*, 488 F.2d 953, 960 (5th Cir., 1974) 10, 15, 18

CONSTITUTION:

United States Constitution, Amendment IV ...1, 2, 7, 20, 21, 24, 25

STATUTES:

Page

Internal Revenue Code,

Section 6201(a) 19
Section 6301 19
Section 7402(b) 2
Section 7601 .....17, 18, 19
Section 7601(a) 17
Section 7602 .....1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 15, 16, 17, 18, 19, 20
Section 7604(a) 2
Section 7801(a) 19
Section 7802 19

RULINGS:

Internal Revenue Service Rev. Proc. 55-6, 1955-2 Cum. Bull. 903 5

IN THE

Supreme Court of the United States

No. 73-1245

UNITED STATES OF AMERICA, *Petitioner*

v.

RICHARD V. BISCEGLIA, as Vice President of the Commercial Bank of Middlesboro, Kentucky, *Respondent*

On Writ of Certiorari from the Judgment of the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

ISSUES PRESENTED FOR REVIEW

1. Whether the "no name" summons issued to the bank was invalid and beyond the authority granted to the Internal Revenue Service in Section 7602 of the Internal Revenue Code of 1954.

2. Whether the "no name" summons issued to the bank constituted an unreasonable search in violation of the Fourth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On April 22, 1971, B. L. Brutscher, Special Agent for the Internal Revenue Service, caused a summons to be served on Richard V. Bisceglia as Vice President of the Commercial Bank of Middlesboro, Kentucky, requesting him to testify and bring with him documents pertaining to the deposit of certain deteriorated $100 bills. The summons was entitled, "In connection with the tax liability of 'John Doe' ". When Mr. Bisceglia refused to comply with the summons, the Internal Revenue Service filed a petition for enforcement of the summons under Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954 in the United States District Court for the Eastern District of Kentucky.

The respondent bank opposed the enforcement of the summons by raising four affirmative defenses. These defenses were (1) that the summons was not authorized under Section 7602 of the Internal Revenue Code and it violated the Fourth Amendment prohibition against unreasonable searches and seizures because it did not specify a taxpayer whose tax liability was being investigated, (2) that the Section 7602 summons was improper because the Internal Revenue Service was conducting a criminal investigation, (3) that the blanket request in the summons was so broad that the bank could not reasonably comply because it could not notify every depositor who transacted business with the bank during the period specified in the summons, and (4) that the Internal Revenue Service did not issue the summons in good faith. The District Court rejected each of these arguments, and in a Memorandum Opinion issued June 1, 1972, the Court authorized enforcement of the summons. That opinion is unofficially reported at 72-1 U.S.T.C. Par. 9474. The Court's order

modified the summons and required the bank to produce copies of all deposit tickets showing the identity of every depositor who made a cash deposit of $20,000 or more from October 16, 1970 to November 16, 1970, and all deposit tickets of every depositor who made a deposit during that period of $5,000 or more which involved $100 bills. The bank sought and obtained a stay on the execution of the summons pending appeal of the District Court order.

The United States Court of Appeals for the Sixth Circuit reversed the lower court ruling on the ground that the summons was beyond the authority of Section 7602 because the IRS failed to specify a taxpayer whose tax liability was being investigated. The Court did not find it necessary to reach the constitutional issue raised by Bisceglia. The Court's opinion is officially reported at 486 F.2d 706 (6th Cir., 1973). From that ruling, the Government sought a writ of certiorari to this Court. This Court granted the writ of certiorari on April 15, 1974.

STATEMENT OF FACTS

On or about November 6, 1970 and November 15, 1970, the Federal Reserve Bank in Cincinnati, Ohio, received two shipments from the Commercial Bank of Middlesboro, Kentucky, each shipment containing two hundred $100 bills. The bills were in a deteriorated condition and no longer fit for circulation. The Cincinnati Branch of the Federal Reserve Bank reported the deposits to the Internal Revenue Service and stated that the deteriorated condition apparently resulted from a long period of storage. The Internal Revenue Service apparently suspected that such money may not have been properly reported for Federal income tax purposes. Accordingly, the IRS attempted

to determine the identity of the persons who transferred the funds to the bank. In the course of this investigation a summons was issued to the bank requesting Richard Bisceglia, Vice President, to testify and to bring all records concerning the person or persons who deposited, redeemed, or otherwise gave to the bank the deteriorated $100 bills. The summons was allegedly issued under the authority of Section 7602 of the Internal Revenue Code. The summons was entitled, "In the matter of the tax liability of 'John Doe' ". The Internal Revenue Service has indicated that John Doe is a fictitious name which was substituted in the form because the IRS did not know the name of the person who transferred the money to the bank. The IRS also admitted that they did not have any specific taxpayer or specific liability under investigation. Bisceglia refused to comply with the summons, and the Government commenced this action by filing a petition for enforcement in the District Court.

INTEREST OF AMICUS CURIAE

The American Bankers Association is a national trade association having approximately 14,000 commercial banks as members. These banks, operating under both state and national charters, comprise virtually the entire commercial banking system of the United States.

A keystone of all banking activity is the relationship between the bank and its customers. This relationship is established when the bank accepts a customer's money for deposit, or when the bank makes a loan to a customer, or when the bank provides any other financial service. In the course of this financial services relationship the bank participates in the private financial affairs of its customers. Traditionally, the bank has treated customers' financial affairs as

confidential matters which are not revealed to others except, of course, under compulsion of law. The issue in this case involves the fundamental question of whether a bank is required by law to provide the Internal Revenue Service with broad access to bank records to establish the identity of unknown bank customers in order to determine whether or not such customers have unsatisfied tax liabilities.

The American Bankers Association has received a large number of inquiries from its member banks in connection with the broad issue of when and how a bank must comply with a request of the Internal Revenue Service to obtain information from bank records in connection with tax investigations of bank customers. Banks have experienced considerable difficulty and misunderstanding of their legal duties in attempting to comply with these requests. The Internal Revenue Service itself sought to establish a standard form summons and standardized procedure under Rev. Proc. 55-6, 1955-2 Cum. Bull. 903, for the purpose of defining when and how the IRS may examine records of taxpayers and third parties. In spite of the issuance of Rev. Proc. 55-6, which establishes Form 2039 as the one standard form summons to be issued under Section 7602, the Internal Revenue Service is using a variety of procedures and forms not defined by the Revenue Procedure, the Code, or the Federal income tax regulations to obtain information concerning bank customers. In this connection, it is to be noted that a bank may be liable to its customer for disclosing information when such disclosure is not required by law. See *Peterson* v. *Idaho First National Bank* 84 Ida. 10, 367 P.2d 284 (1961). Thus, it is critical to banks that the IRS obtain bank records only in accordance with procedures authorized under law.

Finally, we believe that the resolution of this case will have a broad impact on the interpretation of the authority granted to the Internal Revenue Service under Section 7602 of the Internal Revenue Code of 1954. Under these circumstances, the American Bankers Association seeks the leave of this Court to present information concerning the examination of bank records by the Internal Revenue Service in connection with a tax investigation of a bank customer which we believe will be helpful to the Court in the consideration of this case.

SUMMARY OF ARGUMENT

The records of customer transactions maintained by banks have traditionally been recognized as confidential materials. In some cases, the courts have recognized a legal duty of banks to maintain the confidentiality of these records except in cases where the bank is required to release the records under compulsion of law. Banks disclose information concerning their customers' accounts only in very limited circumstances.

The circumstances under which the Internal Revenue Service may obtain records for the purpose of conducting a tax investigation have been spelled out by Congress in Section 7602 of the Internal Revenue Code. We contend that this clear and comprehensive statute establishes the complete parameters of the authority of the Internal Revenue Service with respect to these examinations. Under the clearly defined requirements established by Section 7602, the IRS cannot issue a summons unless (1) it knows the identity of the potential taxpayer it seeks to investigate or (2) it has evidence that a tax liability exists. However, in this case the IRS did not know the identity of the potential taxpayer it sought to investigate and it did not have any

evidence that there was a tax liability yet unsatisfied. Under the purposes set forth in Section 7602, where the identity of the taxpayer is unknown, the IRS should not be allowed to use such innocent facts as deposits or exchanges of $40,000 in old $100 bills as a basis for inferring that a tax liability exists in order to establish grounds for the issuance of a summons for a broad examination of bank records. We maintain that the IRS was engaging in a fishing expedition in the hope of finding a tax liability.

The Fourth Amendment to the Constitution protects individuals against unreasonable searches and seizures. It has long been established that the test of unreasonableness is predicated upon two basic requirements, i.e., the records or other materials sought to be obtained must be relevant to the investigation, and such records or materials must be described with sufficient particularity so as not to constitute an unreasonable burden. In the instant case, the Government sought to examine the records of a large number of bank customers during a thirty day period in order to determine the identity of one potential taxpayer and whether an unsatisfied tax liability existed. We maintain that the extreme breadth of the records sought to be examined to identify a single taxpayer violates the requirement of relevancy and fails to meet the requirement of sufficient particularity under the reasonableness test of the Fourth Amendment. Moreover, we urge that this investigation jeopardized the constitutional rights of a large number of bank customers and placed an unreasonable burden on the bank.

In summary, the statutory and constiutional limitations pertaining to IRS summons for records prohibit fishing expeditions where the identity of the taxpayer

is unknown to the IRS and where there is no evidence of a tax liability. Therefore, we urge that the bank properly rejected this summons and that the law requires the bank to maintain the confidentiality of these records until such time as a legally authorized summons is issued.

ARGUMENT

I.

THE "NO NAME" SUMMONS ISSUED BY THE INTERNAL REVENUE SERVICE REQUIRING THE BANK TO PRODUCE RECORDS IS INVALID AND BEYOND THE AUTHORITY GRANTED TO THE INTERNAL REVENUE SERVICE UNDER SECTION 7602 OF THE INTERNAL REVENUE CODE OF 1954

A. The Summons Is Invalid Because It Fails To Specify a Particular Taxpayer Whose Tax Liability Is Under Investigation.

The IRS summons received by the bank in this case did not indicate the name of the bank customer or customers whose tax liability was being investigated. Indeed, the Sixth Circuit emphasized that not only did the IRS not know the identity of the bank customers, but also the IRS admitted that it neither suspected nor was it investigating a particular person or taxpayer. *United States* v. *Bisceglia,* 486 F.2d 706 (6th Cir., 1973). Nonetheless, the IRS inserted the ficticious name "John Doe" on the form and sought from the bank records on some unknown bank customer or customers who deposited certain unusual $100 bills in the bank sometime during a particular four-week period. The IRS contends that a civil summons may be used to obtain certain records in spite of the fact that the IRS does not know the identity of the person or persons about whom they seek the information. We strongly contend that Section 7602 does not authorize the IRS to conduct inquiries into the private affairs of U.S. citizens and other taxpayers at random, but only allows the IRS to investigate specific persons for certain specific purposes. (Subpart B of this argument will address the purposes for which a summons may be issued.)

Previous case law authority supports the proposition that the Internal Revenue Service cannot use a summons to conduct tax investigations when the identity of the taxpayer is not known and where there is no evidence to indicate that any tax liability exists.

In *Mays* v. *Davis,* 7 F. Supp. 596 (W.D. Pa., 1934) the Internal Revenue Service sought information from a bank concerning the names of beneficiaries of a trust created by a will. In that case, the Internal Revenue Service argued that the information that they would receive from this summons would contribute in determining the correctness of certain tax returns. The bank resisted the summons, arguing that the statutory authority of the predecessor to Section 7602 did not authorize the Internal Revenue Service to seek such private information without further indication that a tax investigation was under way. The Court agreed with the bank, saying that to grant approval of this summons "would be to grant a mere explanatory search for information on the part of the petitioner and that not being within the law, that the petition should be refused". At p. 596.

Similarly, in the case of *McDonough* v. *Lambert,* 94 F.2d 838 (1st Cir., 1938), the Internal Revenue Service served a summons on a corporate treasurer for the purpose of determining certain information about the corporation's tax return. The summons also sought information concerning certain payees of corporate funds.

The Court, in that case, refused to order enforcement of the summons as it applied to information about third parties because it was the corporation's tax liability which was being investigated, and information about the third parties would not affect that tax liability. The Court said,

> We do not think the provisions of this section can be given such a broad construction; that by its terms it is more limited in scope and confined to the procurement of evidence, oral or documentary, bearing upon matters required by law to be included in a given tax return to determine the correct tax liability of the person who made the return or who failed to make one, and was not intended to authorize the procurement of evidence that might be material in verification of the tax return of some other person, not known to the Bureau of Internal Revenue, and who may or may not have a return. At p. 841.

More recently, the United States Court of Appeals for the Fifth Circuit ruled that the Internal Revenue Service cannot use its investigatory authority under Section 7602 unless a specific investigation of specific individuals has been undertaken. The Court said,

> We agree with the District Court that "[t]here must be some nexus between information sought and a specific individual before the government can compel third parties, at their own expense, to give information to the Internal Revenue Service." *United States* v. *Humble Oil & Refining Company,* 346 F. Supp. 944, 947 (S.D. Tex. 1972). Before a Section 7602 summons may issue, the IRS must have traversed the data gathering stage and initiated an investigation. See *United States* v. *Humble Oil Refining Company,* 488 F.2d 953, 960 (5th Cir., 1974).

In reviewing *Bisceglia,* the Sixth Circuit pointed out that the Internal Revenue Service may not examine and summon records in the hope of finding a person who owes a tax liability. The Court said,

> In the past, whenever the IRS has sought to use its summons power as an exploratory or identifying device to compel the production of records pertaining to a group of otherwise unidentified persons in the hope of discovering whether persons in this group may be taxpayers or, if so, may be liable for income taxes, courts have moved swiftly to arrest or curtail the attempt. *Bisceglia, supra,* p. 710-11.

The Government relies strongly on the case of *Tillotson* v. *Boughner,* 333 F.2d 515 (7th Cir., 1964) *cert. denied,* 379 U.S. 913 (1964), for the proposition that an Internal Revenue summons can be used, even though the Internal Revenue Service does not know the name of the taxpayer under investigation. In that case, an attorney had sent a check to the Internal Revenue Service with a letter explaining that the check was anonymous payment for previously underpaid taxes. The Internal Revenue Service issued a summons to the attorney for the purpose of determining the identity of this taxpayer. The lower court in this case distinguished *Tillotson* on the ground that a specific investigation of a tax liability had already begun and that, in fact, there was an admission by the taxpayer's lawyer that a tax liability existed. That situation is quite unlike this case where the Internal Revenue Service is operating on the unsupported assumption that the deteriorated $100 bills deposited in the bank had not been reported for tax purposes. It is also important to note that the Court in the *Tillotson* case was careful to distinguish the *Mays* case, so that the rule established in that earlier decision is still valid.

B. The Summons Is Invalid Because It Does Not Satisfy Any of the Four Conditions Contained in the Statute as Proper Grounds for the Issuance of Such Summons.

Section 7602 (see Appendix) provides that the Secretary or his delegate may (1) examine books and records, (2) summons persons having books and records to produce such materials and give testimony, and (3) take testimony of the taxpayer concerned, for any one of the four specific purposes. These four purposes are:

(1) Ascertaining the correctness of any return,

(2) Making a return where none has been made,

(3) Determining the liability of any person for any Internal Revenue tax, or

(4) Collecting any such liability.

We strongly contend that the summons in this case was not issued for any of the purposes listed. Indeed, after reviewing the four permissible purposes for which a summons may be used, the Sixth Circuit concluded that, "The IRS has not made the demonstration requisite for the enforcement of a summons". *Bisceglia, supra,* p. 712.

Taking the purposes set forth in the statute in order, first, for a summons to be issued for the purpose of ascertaining the correctness of any return, the IRS must have a return in their possession which they have selected for verification. In this case the IRS is not reviewing any specific tax return.

Second, and similarly, a summons cannot be issued for the purpose of compiling information to make a return where none has been made unless the IRS has established that a taxpayer has failed to file a return. There is no evidence that a taxpayer has failed to file a return in this case.

Third, it is possible that this summons has been issued for the purpose of determining the liability of any person for any IRS tax. *We contend that no summons may be issued for this purpose unless the IRS either*

(1) *knows the identity of the taxpayer being investigated, or*

(2) *has some evidence that there is a tax liability yet unsatisfied.*

In this case, neither of these alternative prerequisites are met. The IRS does not know the identity of the taxpayer being investigated, and it does not have the slightest evidence that there is any tax due to the Government for failure to report as income the $100 bills deposited or exchanged in the bank. The only information that the IRS does have is that a sum of money, in somewhat deteriorated condition, has recently been deposited in a bank. The Government in its brief (pages 16 and 17) arrives at several extraordinary conclusions, which are not supported by the facts of this case, in regard to deposits of cash, particularly when they are made in old bills. While acknowledging that there is nothing illegal in using cash as an exchange medium, the Government contends that "a large sum of cash" (in this case, only $40,000) always suggests the possibility that the owner has evaded taxes. Moreover, the Government draws unsupported inferences from the fact that the bills were of a deteriorated quality, going so far as to speculate that the bills had been hidden which further contributes to the Government's inferences of possible tax evasion. Further, the Government makes the extraordinary contention that there is "a strong suggestion that *additional taxes* might be owed

by the owner of [this] cash hoard"—a suggestion that is totally unsupported by the facts of the case.

The mere fact of a deposit or exchange of $40,000 in old bills per se does not in any way support an inference of tax evasion or any other unsatisfied tax liability. The Government through these thinly contrived inferences seeks to establish a basis for conducting a tax investigation and for determining the identity of "an unknown potential taxpayer" through the use of a summons issued in the name of "John Doe".

Thus, we urge that the assumption that there was a tax liability owing to the Government in this case is completely unfounded. There is an unlimited number of reasonable circumstances in which a person would deposit or exchange a large number of old $100 bills in a bank which have nothing to do whatever with evasion of Federal income taxes. There is no evidence in this case to refute a presumption that the circumstances surrounding these deposits were proper and legal, nor is there any evidence to establish a tax liability which should be investigated by the Internal Revenue Service.

Under the two alternative prerequisites stated above (i.e., identity of the taxpayer or some evidence of tax liability), the IRS does not have sufficient grounds for issuing a summons for the purpose of "determining the liability of any person". If this Court were to give a broader reading to this provision of the Code, the IRS would be able to investigate anyone, for any purpose, without any requirement of establishing a nexus between established facts and an existing, unsatisfied tax liability. The IRS would be able to investigate any

person engaged in any transaction which *might* not have been properly reported for income tax purposes. This kind of general authority is inconsistent with the scheme established under Section 7602 which contains four specific conditions under which the IRS is authorized to conduct investigations.

If the Court employs the two alternative prerequisites discussed above, it will find a line of consistency in the previous case law.[1] Under the above interpretation, the summonses issued in *May* v. *Davis, McDonough* v. *Lambert,* and *U.S.* v. *Humble Oil & Refining Company* would be invalid because in those cases neither the identity of the person to be investigated, nor the fact that any tax liability existed was established by the IRS. And the courts in those cases *did rule* that the summonses were invalid. Conversely, the "no name" summonses in the case of *Tillotson* v. *Boughner,* which the Court upheld, would be valid under the above cri-

[1] This two-part test would also shed some light on court decisions handed down since the Sixth Circuit decision in *Bisceglia.* In *United States* v. *Armour,* 74-1 U.S. Tax Court Par. 9479 (D. Conn. 4/25/74), it was undisputed that additional tax would be owed by many of the stockholders of the Hartford Fire Insurance Company because the IRS had reversed itself on an earlier ruling which had approved as tax-free an exchange of stock transaction involving those stockholders. In that case the Government sought to obtain the names of the stockholders from bank records. The Court in *Armour* upheld the use of the summons even though the IRS did not have the names of the stockholders because it was clear that there was a tax liability to be investigated. While we do not approve the use of "no name" summonses in any circumstance because, *inter alia,* such a device provides access to the financial records of a very large number of bank customers, we recognize, as have the Federal Courts, that in some situations such as *Armour* the IRS may actually be investigating a tax liability of a specific person and yet not have his name. In that circumstance a summons would be valid under the two alternative tests offered above. Thus there is no real conflict between the decisions in *Bisceglia* and *Armour.*

teria because even though the IRS did not know the name of the taxpayer it sought to investigate, the IRS had established that a tax liability did exist, that its payment was at least delinquent and perhaps partially unsatisfied, and that a criminal prosecution might be appropriate. These facts were established because the check sent by the taxpayer's attorney was for taxes due and payable. It is important to note that the District Court in the *Tillotson* case distinguished *McDonough* and *Mays* on this ground. The Court said,

> Moreover, these cases [*McDonough* and *Mays* and others] are factually distinguishable because in none did the Commissioner have reason to believe that unpaid taxes were owed by a taxpayer whose name he did not know, and in none did a taxpayer admit his tax liability while concealing his identity. See 225 F. Supp. 45, (N.D. Ill. 1963).

We believe that the case before this Court is similarly distinguishable from the *Tillotson* case and that, under the two-part test mentioned above, the summons was not properly issued for the purpose of "determining the tax liability of any person".

Fourth, and finally, the IRS has not contended in this case that they are collecting a tax liability. Therefore, the fourth purpose for the issuance of a summons under Section 7602 does not apply to this case.

In light of the foregoing analysis of the application of the statute to the facts of the case, it is to be concluded that the IRS summons was not issued for any one of the four specific purposes set forth in Section 7602. Therefore, we argue that the summons is invalid since it does not satisfy the conditions contained in the statute establishing proper grounds for the issuance of the summons.

C. The Summons Issued to the Bank Cannot Be Justified Under the Authority of Section 7601 of the Code.

The summons issued to the bank in this case (Form 2039) cites Section 7602 of the Internal Revenue Code, which is entitled, "Examination of Books and Witnesses". From this reference one can only assume that this particular summons is issued under the authority of Section 7602. Nowhere on Form 2039 is there any reference to Section 7601. It is our contention that Section 7601 (see Appendix) cannot provide the IRS with any statutory authority for the issuance of the summons in this case.

However, when this case was appealed to the Sixth Circuit, the Government attempted to cite both Section 7601 and Section 7602 as authority to conduct the investigation proposed in this case. The Government has made the same argument in its brief to this Court (pages 6 & 9). The Government argues that Section 7602 merely elaborates and specifies some of the investigative powers granted to the Secretary in furtherance of the duties placed upon him under Section 7601(a).

In support of the argument that Section 7601 cannot be used as a basis for issuing summonses such as the one that was issued in this case, we cite the decisions of the Fifth and Sixth Circuits, both of which have recently ruled that Sections 7601 and 7602 are not coterminous.

In ruling on the *Bisceglia* case, the Sixth Circuit stated that Section 7601 did not give the Internal Revenue Service broad authority to issue IRS summons. The Court said,

> Section 7601, however merely "flatly imposes upon the Secretary the duty to convey and in-

quire." *Donaldson* v. *U.S.*, 400 U.S. 517, 523 (1971). Accordingly, we do not believe that Congress intended to provide in this section grounds additional to those specified in Section 7602 for the issuance of a summons. At p. 708-9 n. 3.

In *United States* v. *Humble Oil & Refining Company, supra,* the Fifth Circuit considered a situation where the IRS attempted to use a Section 7602 summons for the purpose of conducting a research project under Section 7601. The Court refused to permit the Internal Revenue Service to treat these two sections of the Code as supplements to each other. The Court said,

> Thus, we hold that the Internal Revenue Service is not empowered by Section 7602 to issue a summons in aid of its Section 7601 research projects or inquiries, absent an investigation of taxpayers or individuals and corporations from whom information is sought. Section 7602 simply cannot be read to give the IRS an unrestricted license to enlist the aid of citizens in its data gathering projects. At pp. 962-963.

Thus, we conclude that Section 7601 cannot be used as a basis to justify the issuance of a summons to determine the identity of a potential taxpayer. The only section of the Internal Revenue Code which can be used for this purpose is Section 7602. In other parts of this brief we have argued that the Internal Revenue Service has not satisfied the requirements of Section 7602 for the purpose of issuing the summons which the bank received.

The Government, in its brief filed with this Court (pages 20-22), has further attempted to find statutory

authority for the issuance of a "no name" summons in this case in the general administration and enforcement statutes of the Code, such as Sections 7801(a), 7802, 6201(a), and 6301. The Government had not sought to use these sections of the Internal Revenue Code as authority for the issuance of the summons in this case or in previous cases. We suggest that these very general statutes are even less relevant than Section 7601 to the scope of the authority of the Internal Revenue Service to issue a summons as part of a tax investigation. We maintain that these general statutes cannot be read to overcome the specific language contained in Section 7602 concerning the purposes for which the IRS may issue a summons.

D. Requiring the IRS Either To Identify the Taxpayer or To Specify that a Tax Liability Does Exist, Will Not Unduly Hamper the IRS in the Performance of Its Duties.

The Government has contended in its brief (page 8) that the ruling of the Sixth Circuit in this case "would seriously undermine the ability of the Internal Revenue Service to insure that all Federal taxes due are reported and paid". In the first instance, we find no information which would support the accuracy of that statement. In cases where the IRS has determined that, in fact, a tax liability does exist, it will be able to issue a summons even though it may not know the name of the taxpayer being investigated. See for example, *Tillotson* v. *Boughner, supra* and *United States* v. *Armour, supra.* Thus, the only situation in which the IRS might be restricted from conducting investigations is where the IRS obtains information concerning a particular transaction in which it does not know the name of the parties to the transaction, *and in which it can only sur-*

mise that a tax liability theoretically might be owing without any evidence of such liability.

Second, in spite of the statutory duties of the Internal Revenue Service concerning the collection of taxes due to the United States, it is clear that there are limitations placed on the authority of the IRS to use Section 7602 summonses to conduct tax investigations.

For example, the Fourth Amendment prohibition against unreasonable searches and seizures applies to every investigation by the Government, including administrative summonses issued by the Internal Revenue Service (See Part II, p. 21.) In addition, the Supreme Court has acknowledged that the recipient of a summons can resist its enforcement on the ground that the material is sought for the improper purpose of obtaining evidence in a criminal prosecution or for obtaining evidence that is protected by the attorney-client privilege. *Reisman* v. *Caplin*, 375 U.S. 440-449 (1964). Further, Congress did not give the IRS absolute authority to investigate the payment of income taxes without any restriction. Section 7602 specifies four particular purposes for which an examination may be conducted. That section *cannot* be read so as to infer that the IRS may make a tax investigation at any time, for any purpose, even though it is pertinent to the collection of taxes which *might* be due to the United States. Thus, the Government's statement that the IRS will be hampered in its ability to perform unless it can use the so-called "no name" summons virtually without limit to identify potential taxpayers is without merit.

II.

THE "NO NAME" SUMMONS ISSUED BY THE INTERNAL REVENUE SERVICE REQUIRING THE BANK TO PRODUCE RECORDS IS INVALID AND CONSTITUTES AN UNREASONABLE SEARCH IN VIOLATION OF THE FOURTH AMENDMENT

The first issue in this case involves the interpretation of the statute which authorizes the Internal Revenue Service to examine and/or summons records. We also urge that there are compelling constitutional limitations on the Secretary's authority to examine records. These limitations have been transgressed in the case of the "no name" summons served on the Commercial Bank, Middlesboro, Kentucky.

The courts have previously indicated that the principles of the Fourth Amendment apply to the investigations conducted by administrative agencies and, specifically, to the IRS summonses such as the one issued in this case. In *Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 186, 208 (1946), the Supreme Court indicated that the Fourth Amendment required that the Government particularly describe the material requested and that the material requested must be relevant to the inquiry being conducted. In discussing the applicability of constitutional safeguards to subpoenas for corporate records, this Court stated,

> . . . and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be "particularly described," if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable. At p. 208.

The principles of this Court's decision in that case were applied to an IRS summons in the case of *United States* v. *Dauphin Deposit Trust Co.*, 385 F.2d 129 (3rd Cir., 1967).

The relevancy requirement has been a long standing test of the validity of an IRS summons. The general rule is that bank records are relevant to tax investigations. See *United States* v. *First National Bank of Mobile*, 295 F.142 (S.D. Ala., 1924), *aff'd. without opinion*, 267 U.S. 576 (1925). However, the relevancy requirement has been clarified so that a more specific determination of relevancy must be made. Thus, the IRS may not investigate all of the records of a third party on the ground that such records are relevant to the tax liability of a given taxpayer. See for example, *Hubner* v. *Tucker*, 245 F.2d 35 (9th Cir., 1957), where the Court said,

> It has heretofore been held that, so far as a member of the general public is concerned, not a taxpayer, the privilege against an unreasonable search and seizure should be given great effect. Echoes of the American Revolution are found in this protest against a general warrant which permits the search and seizure of all the papers of an individual. We do not believe that, simply because some taxpayer may have had a grocery account entered upon the books of the grocer, the intention of Congress was to allow the Internal Revenue Service to investigate all the records of the grocer on the theory that some of them might be relevant to the inquiry of the tax status of another person. At p. 41.

We urge upon the Court the consideration that the relevancy test applied in *Hubner* v. *Tucker, supra,* which was recognized by this Court as one of the principal ingredients of the requirement that "the disclosure shall not be unreasonable" in *Oklahoma Press Publishing Company, supra,* is particularly applicable to the facts of the *Bisceglia* case. In *Hubner,* although the Government knew the identity of the taxpayer, it sought to examine all of the records of a third party on the theory that some of them might be relevant to the taxpayer's unsatisfied tax liability. The Ninth Circuit rejected the validity of this investigation on the ground that these records were not shown to be relevant and that therefore the investigation was unreasonable. In the instant case, *without* knowing the identity of the taxpayer, the Government sought to examine all deposit and cash tickets of every depositor who made a deposit in excess of a certain amount during a thirty-day period. We urge upon the Court that the extreme breadth of this inquiry should be held to be invalid on the ground that the deposit records of a large number of depositors other than the potential taxpayer have not been shown to be relevant to an investigation to establish the identity of a single taxpayer.

In *United States* v. *Harrington*, 388 F.2d 520 (2nd Cir., 1968), the Court of Appeals indicated that the appropriate test for relevancy was "whether the inspection sought might have thrown light upon the correctness of the taxpayer's return". It is also to be emphasized that the question of relevancy is not satisfied by a simple declaration by the Internal Revenue agent. See *Hubner* v. *Tucker, supra.*

As we discussed previously, we do not believe that the IRS has established any evidentiary connection between the deposits or exchanges of $40,000 in deteriorated $100 bills and the tax liability of any person. There is no foundation for the assumption that because the

bills are in a deteriorated condition they are unreported for tax purposes. The IRS is simply engaging in a fishing expedition in the hope of finding some tax liability which may or may not exist. Such a fishing expedition, without any demonstration of how these transactions relate to the non-payment of taxes or the correctness of a tax return, violates the relevancy requirement which is embodied in the Fourth Amendment prohibition against unreasonable searches by the Government.

We also urge that the summons was insufficient in its description of the information sought for the purpose of determining the identity of one potential taxpayer and that, accordingly, it has failed to meet the particularity requirement established in *Oklahoma Press Publishing Company, supra.* In *Bisceglia* the IRS sought to examine the deposit records of the bank for the period October 22 through November 13, 1970 (later modified by the District Court to cover the period October 16 to November 16, 1970). The bank received deposit tickets and/or cash tickets at the rate of approximately 1,800 to 2,200 tickets a day during that period. Even if it were possible to examine all of the bank's records during that period, there still may be no indication as to where the money came from. Further, the IRS nas not supplied any name or account number with which the bank might be more readily able to provide the information sought. As stated above, the breadth of this investigation covering the deposit records of a large number of bank customers clearly jeopardizes their right against unreasonable searches under the Fourth Amendment. Moreover, to request the bank to produce such a large volume of records to identify a single potential taxpayer would be to put an unreasonable burden on the bank. Such unreasonable burdens are prohibited by the Fourth Amendment.

Thus, we urge that the summons issued in this case is invalid and violates the Fourth Amendment prohibition against unreasonable searches, both on the ground that the Government has not established the relevancy of the records sought, and on the ground that the large number of records sought would jeopardize the constitutional rights of other bank customers and would impose an unreasonable burden on the bank.

CONCLUSION

The American Bankers Association respectfully urges the Court to affirm the decision of the United States Court of Appeals for the Sixth Circuit, and hold that the "no name" summons issued to the Commercial Bank of Middlesboro, Kentucky was invalid for the reasons stated in this brief.

Respectfully submitted,

JOHN FLETCHER ROLPH, III
Tax Counsel

HENRY C. RUEMPLER
Assistant Tax Counsel

AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

APPENDIX

Section 7601(a) and Section 7602 of the Internal Revenue Code of 1954

SEC. 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS.

(a) GENERAL RULE.—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.